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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 595

ALEXANDER P. TUREAUD, JR., a Minor, by Alexander P. Tureaud, Sr., his father and next friend,

Petitioner,

vs.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on October 28, 1953.

Opinions Below

The opinion, findings of fact and conclusions of law of the District Court (R. 21-30) is reported in 116 F. Supp. 248. The opinion of the Court of Appeals (R. 35-45) is reported in 207 F. 2d 807.

Jurisdiction

The judgment of the Court of Appeals was entered on October 28, 1953 (R. 45). Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1251(1). On November 16, 1953 this Court stayed the judgment of the Court of Appeals, pending the filing and final disposition of this petition for writ of certiorari. An order extending the time for filing this petition from January 26, 1954 to February 16, 1954 was granted on January 26, 1954 (R. 47).

Question Presented

Whether this is a cause which must be heard and determined by a district court of three judges pursuant to Title 28, United States Code, Section 2281 et seq.

Constitutional Provision Involved

Article XII, Section I of the Constitution of Louisiana provides as follows:

The educational system of the state shall consist of all free public schools, and all institutions of learning supported in whole or in part by appropriations of public funds. Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years.

Statement of the Case

The Complaint and Hearing on the Motion for Preliminary Injunction

Petitioner is a minor of 17 years of age. He is a citizen of the United States and a citizen and resident of the State of Louisiana (R. 2). On or about June 5, 1953, petitioner,

being duly qualified, made application for admission at the next regular school term beginning September, 1953, to the first-year class (Junior Division) of Louisiana State University and Agricultural and Mechanical College (R. 5), an institution of higher learning maintained and supported by the State of Louisiana. Petitioner desired to pursue a combined course in arts and science and law offered under the curriculum of the College of Arts and Sciences and the School of Law. Those successfully completing this course receive both an A.B. or B.S. degree and an LL.B. degree in six rather than seven years (R. 4-5). On or about August 8, 1953, petitioner was advised by respondent, John A. Hunter, registrar of the University, of the rejection of his application (R. 6) pursuant to the University's policy of "not admitting Negro students to that area." (Pre-trial depositions, p. 52.) Whereupon, petitioner, by his father and next friend, instituted the present litigation.

In his complaint, petitioner made application for a temporary and permanent injunction to restrain respondents from refusing solely on the basis of race and color to admit him and other Negroes similarly situated to Louisiana State University to pursue the combination course in arts and science and law (R. 2, 8, 11). Jurisdiction was invoked under Title 28, United States Code, Section 2281 (R. 2). Petitioner sought a hearing and determination by a district court of three judges of his application to enjoin respondents from refusing to admit him to Louisiana State University in the enforcement and execution of a state statute and order of the respondent Board of Supervisors barring the admission of Negroes to the University. It was alleged that the statute and order were in conflict with the federal Constitution.

The District Judge, however, taking the view that a three-judge court was not required, ordered the case set down for hearing before him sitting alone. Petitioner abandoned his claim to a hearing before a specially con-

stituted federal court as required under Title 28, United States Code, Section 2281 and proceeded without protest to a hearing on the motion for preliminary injunction. No proof tending to establish a claim of the unconstitutionality of segregation *per se* was submitted. Rather the evidence dealt solely with whether the educational opportunities, offerings and facilities at Southern University, the state-supported institution of higher learning for Negroes, were equal or substantially equal to those available at Louisiana State University with respect to the combination course desired (see depositions, findings of fact and appendix thereto of the District Court). Respondents filed a motion to dismiss and a return and answer (R. 13). After hearing on the motion for preliminary injunction and consideration of the evidence presented, including pre-trial depositions and catalogues of Louisiana State University (introduced as Plaintiff's Exhibit #1) and of Southern University (introduced as Plaintiff's Exhibit #3), the court, on September 11, 1953, denied respondent's motion to dismiss, and found that petitioner was denied his constitutional right to receive equal educational opportunities by being refused admission to Louisiana State University. The court, thereupon, issued the temporary injunction applied for, restraining respondents from refusing to admit petitioner to the Junior Division of Louisiana State University to pursue the combination course in arts and science and law for which he had applied (R. 32).

The evidence adduced at the pre-trial depositions, and from the catalogues of Louisiana State University and Southern University which is set out in substance in the appendix to the District Court's findings of fact (R. 27 *et seq.*), amply supports the court's findings of fact that petitioner could not receive at Southern University educational opportunities equal to those available at Louisiana State University.

The Evidence as to Equality of Facilities

1.

LOUISIANA STATE UNIVERSITY

Respondents offer a combination arts and science and law course at Louisiana State University whereby a student may complete the requirements for and receive an A.B. or B.S. and an LL.B. degree in six years rather than in seven years (Catalogue of Louisiana State University 1953-1955 [hereafter referred to as Pl. Ex. #1], pp. 77 and 151); a combination course in commerce and law (Pl. Ex. #1, pp. 113 and 151), and in geology and law (Pl. Ex. #1, pp. 100 and 151).

SOUTHERN UNIVERSITY

Southern University offers a combination course in political science and law, English and law and mathematics and law (Catalogue of Southern University [hereafter referred to as Pl. Ex. #3], pp. 208-210). Very few students have undertaken this course and no degree under this program has been awarded at Southern (depositions, p. 88). At present only one applicant has applied for the combination curriculum (depositions, p. 89).

2.

LOUISIANA STATE UNIVERSITY

Louisiana State University operates on an annual budget of $12,000,000 (depositions, p. 12). It has 6400 students (depositions, p. 54) with a per capita operating cost of $1875.00 per student. It is composed of 17 major administrative divisions, including a Junior Division, a Junior College, a Junior Term, a General Extension Division, a University College (for those unable to attend regular day sessions, Pl. Ex. #1, pp. 160-161) and 12 other colleges with various divisions, departments and schools within these colleges (Pl. Ex. #1, p. 37), and offers bachelors degrees at the college level, masters and doctoral degrees at the gradu-

ate school level, and various degrees at the professional school level (P. Ex. #1, p. 37). It is a member of the Southern Association of Colleges and Secondary Schools (depositions, p. 9).

SOUTHERN UNIVERSITY

Southern University operates on an annual budget of $2,000,000 (depositions, p. 59). There are approximately 2900 students enrolled in the college proper (depositions, p. 73) with a per capita cost of $689.65 per student. With the exception of the law school, the entire instruction offered is at the college level (depositions, p. 59). It is in fact a general college (depositions, p. 59). The institution is approved by the Southern Association of Colleges and Secondary Schools, but unlike Louisiana State University is not a member of that accrediting agency (depositions, p. 59). There are 150 regular faculty members outside the law school in the entire University (depositions, p. 60), including 91 instructors, 30 assistant professors, 16 associate professors and 16 full professors (depositions, p. 71).

3.

LOUISIANA STATE UNIVERSITY

At the college level is the Junior Division (where all first year college work is concentrated), the College of Agriculture, the College of Chemistry and Physics, the College of Commerce, the College of Education, the College of Engineering, the College of Arts and Sciences and a School of Music (Pl. Ex. #1).

SOUTHERN UNIVERSITY

The college offers a program of freshman studies (Pl. Ex. #3, pp. 69-73 incl.). It contains a Division of Agriculture (Pl. Ex. #3, p. 74) as compared with a College of Agriculture at Louisiana State University; a Division of Business (Pl. Ex. #3, p. 86) as compared with a College

of Commerce at Louisiana State University; a Division of Education (Pl. Ex. #3, p. 100) as compared with a College of Education at Louisiana State University; a Division of Health and Physical Education (Pl. Ex. #3, p. 131); a Division of Home Economics (Pl. Ex. #3, p. 138); a Division of Industrial and Technical Education (Pl. Ex. #3, p. 146); a Division of Military Science and Tactics (Pl. Ex. #3, p. 196); a Division of Music (Pl. Ex. #3, p. 201) as compared with the School of Music at Louisiana State University and a Division of Liberal Arts and Sciences (Pl. Ex. #3, p. 162) as compared with a College of Arts and Sciences at Louisiana State University.

4.

LOUISIANA STATE UNIVERSITY

The College of Arts and Sciences is headed by Dean Cecil G. Taylor, who holds a Ph. D. degree (depositions, p. 15, and Pl. Ex. #1, p. 93). It contains 18 departments in the following fields: Air Science; Books and Libraries; Botany; Bacteriology and Plant Pathology; English; Fine Arts; Foreign Languages (Classical, Germanic and Slavic and Romance); Geography and Anthropology; Geology; Government; History; Journalism; Mathematics; Military Science; Philosophy; Psychology; Sociology; Speech; and Zoology, Physiology and Entomology (Pl. Ex. #1, p. 93). The college is staffed by 160 regular faculty members plus an additional instructional force below the faculty rank (depositions, p. 34). Of the regular faculty staff of 160, approximately 25% are assistant professors, 25% are associate professors, and 25% are of full professional rank (depositions, p. 35). Between 600 and 700 students are enrolled (depositions, p. 16). The goal of the college is to secure as instructors those who hold Ph. D. degrees in their respective fields (depositions, p. 35). The Dean's salary is $9700 (depositions, p. 40).

SOUTHERN UNIVERSITY

The Division of Liberal Arts and Sciences is composed of nine departments including the departments of Fine and Applied Arts; Biology; Chemistry; Physics (as compared to the College of Chemistry and Physics at Louisiana State University), English; Mathematics; Modern Foreign Languages; Psychology; and Social Sciences. There are some 66 regular faculty members including a part-time instructor (Pl. Ex. #3, pp. 164, 167, 170, 177, 172, 176, 179, 181, 182). It should be noted that there is no department of Air Science; Books and Libraries; Botany; Bacteriology and Plant Pathology; Geography and Anthropology; Geology; Government; History; Journalism; Philosophy; Sociology; Speech; or Zoology. It should also be noted that Greek, Germanic and Slavic Languages, Italian and Portuguese are not taught.

Dean J. D. Cade who holds an M.A. degree (Pl. Ex. #3, p. 8) is dean of the College and Director of the Division of Liberal Arts and Sciences (Pl. Ex. #3, p. 163). He receives a salary of $7200 (depositions, p. 97). The requirement at Southern for an instructorship is a Master's degree (Pl. Ex. #3, p. 72).

5.

LOUISIANA STATE UNIVERSITY

In the College of Arts and Sciences, the catalogue indicates that the Department of Books and Libraries has two instructors and offers two courses (Pl. Ex. #1, p. 181); the Department of Botany, Bacteriology and Plant Pathology has eleven faculty members and offers 37 courses (Pl. Ex. #1, pp. 181-182); the Department of Ancient and Modern Foreign Languages has two professors in Classical Languages and offers 17 courses (Pl. Ex. #1, p. 174), 3 teachers of German, Slavic and Russian languages and offers 17 courses (Pl. Ex. #1, pp. 174-175), and 12 teachers of Romance languages, offering 23 courses in French, 2 in

Italian, 2 in Portuguese, 20 in Spanish and 2 in Romance Philology and Bibliography (Pl. Ex. #1, pp. 175-178); the Department of English has 33 teachers and offers 64 courses (Pl. Ex. #1, pp. 201-203); the Department of Fine Arts has 12 teachers and offers 42 courses (Pl. Ex. #1, p. 203); the Department of Government has 5 professors and offers 32 courses (Pl. Ex. #1, p. 212); the Department of History has 10 teachers and offers 38 courses (Pl. Ex. #1, pp. 218-219); the Department of Journalism has 6 teachers and offers 19 courses (Pl. Ex. #1, pp. 223-224); the Department of Mathematics has 25 teachers and offers 38 courses (Pl. Ex. #1, pp. 225-226); the Department of Philosophy has 3 teachers and offers 22 courses (Pl. Ex. #1, pp. 234-235); the Department of Psychology has 9 teachers and offers 44 courses (Pl. Ex. #1, pp. 238-239); the Department of Sociology has 11 professors and offers 41 courses (Pl. Ex. #1, pp. 243-245); and the Department of Zoology, Physiology and Etomology has 11 teachers and offers 45 courses (Pl. Ex. #1, pp. 252-255).

SOUTHERN UNIVERSITY

Within the Division of Liberal Arts and Sciences at Southern, the catalogue indicates that the Department of Fine and Applied Arts has 3 faculty members and offers 18 courses (Pl. Ex. #3, pp. 164-166); the Department of Biology has 12 faculty members, with one on leave, and offers 31 courses (Pl. Ex. #3, pp. 167-170); the Department of Chemistry has 4 faculty members and offers 11 courses (Pl. Ex. #3, pp. 170-172); the Department of English has 17 faculty members, one of whom is designated as part time, and offers 27 courses, including 6 courses in English Composition and Journalism and 11 courses in Speech (Pl. Ex. #3, pp. 173-176); the Department of Mathematics has 7 faculty members and offers 11 courses (Pl. Ex. #3, pp. 176-177); the Department of Physics has 3 faculty members and offers 5 courses (Pl. Ex. #3, pp. 177-178); the Depart-

ment of Modern Foreign Languages has 4 teachers, with one on leave, and offers 10 courses in Spanish, 4 in German and 9 in French (Pl. Ex. #3, pp. 179-181); the Department of Psychology has one teacher and offers 10 courses (Pl. Ex. #3, pp. 181-182); the Department of Social Sciences has 15 faculty members, with one on leave, and offers 96 courses—15 courses in Economics, 12 in Geography, 30 in History, 22 in Political Science, 15 in Sociology and 2 in Anthropology (Pl. Ex. #3, pp. 182-193).

6.

LOUISIANA STATE UNIVERSITY

Louisiana State University offers a combined course in arts and sciences and law, geology and law, and commerce and law as indicated. After completion of the Junior Division, a student must complete prescribed minimum requirements for the arts and science degree (Pl. Ex. #1, p. 96) and he may receive the remainder of the necessary credits for his degree by choosing from a variety of electives, within certain limitations as set out in Plaintiff's Exhibit #1, page 96 and depositions, pages 30-33. After completion of the Junior Division a student who at first matriculated for the arts and sciences and law course may switch to geology and law without loss of time or credits (depositions, p. 33). There is no question but that this combination curriculum is a working program and going concern.

SOUTHERN UNIVERSITY

Southern University offers a combination curriculum in 3 fields as previously indicated. The program is fixed as set forth in the school catalogue (Pl. Ex. #3, pp. 208-210). No deviation from the course of study there prescribed is permissible under Southern's program (depositions, pp. 97-98).

7.

EVIDENT CONCLUSIONS

a. With respect to the combined arts and sciences and law curriculum at Louisiana State University as contrasted with the combination curriculum at Southern, the student pursuing the course at Louisiana State University has far greater advantages and opportunities than a student at Southern.

b. The combination curriculum at Louisiana State University is a well-organized, well-functioning program. At Southern, on the other hand, while the course exists on paper, as yet no degree has been awarded under this program and only one student has indicated interest at the present school term.

c. The Louisiana State University student in the College of Arts and Sciences has 160 regular faculty members available of which 75% are of professional rank. The students at Southern have only 66 faculty members available in the Division of Liberal Arts, and if the Division in rank follows that in the entire college, approximately 40% of these are of professional status.

d. The variety of courses offered is greater than at Southern and the student has opportunity to obtain a richer and more diversified background in Liberal Arts than is possible under Southern's program.

Proceedings at the Appellate Level

Respondents appealed to the United States Court of Appeals. That Court on October 28, 1953, with one judge dissenting, reversed the judgment of the District Court on the ground that the District Judge was without jurisdiction since this was a case which should have been heard and determined by a district court of three judges (R. 45).

Petitioner applied to this Court for a stay of the judgment of the Court of Appeals, which application was granted on November 16, 1953. On January 26, 1954, an order was issued extending the time for the filing of this petition until February 16, 1954 (R. 47).

Specifications of Errors to Be Urged

The Court of Appeals Erred:

1. In holding that the case should have properly proceeded pursuant to the requirements of Title 28, United States Code, Section 2281 *et seq.* and that, therefore, the judgment of the District Court was a nullity.

2. In holding that petitioner, in proceeding to hearing before the District Court, in failing to press his claim *in re* the constitutionality of segregation *per se* and in merely resting his case upon the inequality of educational facilities and opportunities, had not waived and abandoned his right to a hearing before a district court of three judges.

3. In holding in effect that a district judge may not view the case in its totality and properly refuse to convene a three-judge court rather than be bound by the mere formal averments of the complaint.

4. In holding that this case was required to be heard by a district court of three judges despite the fact that the basic issue—the right of Negroes to attend Louisiana State University where other equal educational opportunities were not available—was not one of first impression in the court below.

Reasons for the Allowance of the Writ

I. Settlement of the question presented here is clearly necessary because it involves an important question of federal procedure and practice. In construing Title 28, United States Code, Section 2281 *et seq.*, this Court has evolved rules and regulations designed to protect the administration of state laws against hasty and improvident invalidation by federal courts and at the same time protect the public need for efficient administration of the federal judicial system. Since the problem here raised is likely to arise in a large variety of cases where injunctive relief against denial of civil rights is being sought, it should be determined by this Court.

II. The decision of the Court of Appeals is in conflict with the basic principles enunciated by this Court defining the reach and application of Title 28, United States Code, Sections 2281 and 2284.

A. Title 28, United States Code, Sections 2281 and 2284, may be properly invoked only when injunctive relief is sought against state legislative policy as defined in state constitutions or statutes or in the orders of state administrative agencies on the ground that the state's policy as thus defined is unconstitutional under the Constitution of the United States. *Phillips* v. *United States*, 312 U. S. 246; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Ex Parte Williams*, 277 U. S. 267; *California Water Service Co.* v. *Redding*, 304 U. S. 252.

1. No constitutional or statutory provision of the State of Louisiana forbids the admission of petitioner or of Negroes similarly situated to Louisiana State University and Agricultural and Mechanical College on the grounds of

race and color. Petitioner cites Article XII, § 1 of the Constitution which provides as follows:

> The educational system of the state shall consist of all free public schools, and all institutions of learning supported in whole or in part by appropriations of public funds. Separate free public schools shall be maintained for the education of white and colored children between the ages of six and eighteen years.

It should be noted here that racial segregation is made mandatory only with respect to free public schools. Obviously, this provision does not include Louisiana State University. No reference is made in the above-mentioned constitutional provision, or indeed in any state statute which petitioner's counsel has been able to find, concerning the racial composition of the student body at Louisiana State University and Agricultural and Mechanical College. The Court's attention is also directed to *Wilson* v. *Board of Supervisors*, 92 F. Supp. 986, 988 (E. D. La. 1950), appeal dismissed 340 U. S. 909, in which counsel for both the Negro applicant and the University conceded and the Court found that there were no state statutes or constitutional provisions which by their terms specifically forbade the admission of Negroes to Louisiana State University and Agricultural and Mechanical College. Therefore, it does not appear that the claim of an unconstitutional legislative policy forbidding petitioner's admission to Louisiana State University because of race as defined in the statutes or constitutional provisions of the State of Louisiana appearing in petitioner's amended complaint (R. 2, 5) can be sustained.

2. There is no state legislative policy in the form of delegated legislation by an administrative body or agency which prohibits petitioner or other Negroes similarly situated from being admitted to Louisiana State University

because of their race and color. Reference is made in paragraph 8 of the amended complaint to an order of the Board of Supervisors of Louisiana State University excluding Negroes from all colleges and undergraduate departments (R. 5). No proof of the existence of any such order, however, was established by either petitioner or respondents in any of the proceedings in this case. Petitioner's rejection is based by respondents upon an established University policy, custom and usage (pre-trial depositions, pp. 8, 52). The closest evidence relative to the existence of such an order occurs in the following exchange between counsel for petitioner and the President of the University (depositions, pp. 8, 9):

"Q. Are you familiar with the application of the plaintiff in this action, Mr. Tureaud's application?

A. Yes, sir.

Q. Will you tell me, advise me, why, what reason he was refused admission?

A. Because it has been a tradition and a policy of the university of long standing that we do not admit Negro students.

Q. Has this policy been the policy set by the Board of Supervisors?

A. I presume it was set many years ago, I wouldn't know, but it has been a policy so long as I have been there. I have been there about 23 years.

Q. How were you advised of the policy, General Middleton?

A. Well, at first it was through custom.

Q. At first it was through custom, and now what is it on?

A. I think it was 1951 the question of entrance of Negro students was discussed at a Board meeting. The Board advised me that when a Negro student applied for admission, to refuse the admission and report my actions to the Board.

Q. I see. So that in refusing the admission of the plaintiff in this action, you were acting pursuant to the order of the Board of Supervisors?
A. That's right."

There is no evidence that any formal order barring petitioner or other Negroes was ever issued by the Board of Supervisors. Indeed, the President was pursuing a policy which had been in existence longer than the 23 years he had been connected with the University. Unlike *Wilson* v. *Board of Supervisors, supra,* where the Board of Supervisors promulgated and published a specific order barring Wilson's admission, no such action was taken here. The advice of the Board to the President of the University would not appear to be delegated state legislation of an administrative board or agency sufficient to satisfy the jurisdictional requirements of Title 28, United States Code, Section 2281 as defined by this Court in *Phillips* v. *United States,* 312 U. S. 246, 251.

B. Even where there is in existence state statutes or orders of administrative agencies whose constitutionality is under attack, the jurisdictional requisites sufficient to properly invoke Title 28, United States Code, Section 2281 are not met unless the claim of unconstitutionality is substantial. *Ex Parte Bruder,* 271 U S. 461; *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171; *Gully* v. *Interstate National Gas Co.,* 292 U. S. 16; *California Water Service Co.* v. *Redding, supra.*

Although the averments of unconstitutionality are made in the amended complaint, proof was directed solely to the establishment of the fact that petitioner's rejection was illegal because he was not able to obtain equal educational opportunities. The invalidity of the enforcement of segregation laws under such circumstances is too firmly settled,

see *Plessy* v. *Ferguson*, 163 U. S. 573; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631, to warrant the needless expense and drain upon the federal judiciary which is necessarily involved in the convening of a district court of three judges under the mandate of Title 28, United States Code, Section 2281.

It should be added further that the legal claim litigated and resolved by the District Court—the right of petitioner to attend Louisiana State University because the educational opportunities and facilities at Louisiana State University were superior to those available at Southern University, the state-supported institution for Negroes—was not a question of first impression. Within the past three years this same question has been before the District Court, and on each occasion the Negro applicant has been ordered admitted to Louisiana State University. See *Wilson* v. *Board of Supervisors, supra; Foister* v. *Board of Supervisors*, Civil Action No. 937 (E. D. La. 1952); *Payne* v. *Board of Supervisors*, Civil Action No. 894 (E. D. La. 1952). And, moreover, the basic issue was heard and determined in the first instance by a district court of three judges in *Wilson* v. *Board of Supervisors, supra*. The basic issue having been decided consistently with the decisions of this Court, the necessity for relitigation of each successive claim before a specially constituted court appears to be not only unnecessary but wasteful.

C. Where an applicant has properly made a claim of unconstitutionality sufficient to warrant a hearing and determination by a three-judge court, such claim may be abandoned and the matter properly litigated before a single district judge. *Ex Parte Hobbs*, 280 U. S. 168; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419. The decision of the Court of Appeals (R. 38-39) concedes that such an abandonment may be made. Yet the fact that petitioner failed to press his

claim as to the unconstitutionality of segregation *per se*, and rested his case solely on the ground that his exclusion from Louisiana State University was a denial of his constitutional rights in that there were no other equal facilities available within the state, was not considered a sufficient abandonment by the Court of Appeals. As such the decision appears to be in direct conflict with the rationale of this Court in *Ex Parte Hobbs, supra.*

D. Title 28, United States Code, Sections 2281 and 2284, were designed to secure the public interest in a limited class of cases of special importance and to make certain that state legislation would not be invalidated by a conventional suit in equity. In view of the fact that the procedural device entails a serious drain upon the federal judicial system and upon the appellate docket of the United States Supreme Court, the statute has been construed as an enactment of the greatest technicality which must be strictly and closely construed. *Phillips* v. *United States*, 312 U. S. 246; *Rorick* v. *The Everglades Drainage Dist.*, 307 U. S. 208; *Ex Parte Bransford*, 310 U. S. 354.

Under the decision of the Court of Appeals, where the formal averments of unconstitutionality are made, even though petitioner may decide to proceed before a single district judge and rest his suit on a theory of law firmly foreclosed by decision of this Court, the district judge nevertheless is without jurisdiction to hear the cause but must convene a three-judge court. This, we submit, gives a far more liberal construction of Section 2281 than is warranted by the application of principles enunciated in decisions of this Court. See *Ex Parte Hobbs, supra; Phillips* v. *United States, supra; Ex Parte Bransford, supra.*

III. There is confusion and conflict among the Courts of Appeal as to the appropriate application of Title 28, United States Code, Section 2281 *et seq.*, particularly in the areas

of controversy involved in the instant case and this confusion and conflict should be resolved by this Court.

Illustrative of this confusion and conflict are the following:

A. Under the instant decision, a court of three judges is required where the necessary formal jurisdictional averments are made in the complaint in spite of the complainant's acquiescence in having a hearing before a single district judge: (1) even though the suit as pressed merely seeks admission of a Negro applicant to the state university on the grounds of absence of equal educational opportunities and facilities, and (2) in the absence of a state statute or order of an administrative board or agency which by its terms prohibits petitioner's admission to the state university because of race.

B. The Fourth Circuit in *Carter* v. *School Board of Arlington County*, 182 F. 2d 531 (CA 4th 1950), and in *Corbin* v. *School Board of Pulaski County*, 177 F. 2d 924 (CA 4th 1949), found nothing procedurally amiss in a conventional suit in equity seeking injunctive relief against state officers denying to Negroes equal educational advantages and opportunities. In both cases a statute of the State of Virginia expressly required segregation of Negro and white students at the educational levels involved. Thus, in both instances the officials were enforcing a policy of statewide application and concern. See *Cleveland* v. *United States*, 323 U. S. 329. While the complaint in both cases did not seek to invoke jurisdiction under Section 2281, if the present decision is correct, cases of this nature must at all times be brought and heard before a three-judge district court.

C. In *Gray* v. *Board of Trustees*, 97 F. Supp. 463 (Tenn. 1951), vacated as moot, 342 U. S. 517, a complaint properly drawn to satisfy the jurisdictional prerequisites of Section

2281 *et seq.* was held not to present a substantial claim of unconstitutionality sufficient to warrant determination by a court of three judges. Rather the case was treated as one merely presenting a claim of denial of equal facilities, determination of which was appropriate in an ordinary suit in equity.

IV. There is a conflict within the Fifth Circuit itself on this question which should be resolved by this Court. The district judge and one member of the Court of Appeals in this case take the view that this is an appropriate case to be determined by a single judge. Two other judges on the Court of Appeals have a contrary position. In the same district court involved here, after *Wilson* v. *Board of Supervisors, supra,* had been decided, *Foister* v. *Board of Supervisors,* and *Payne* v. *Board of Supervisors, supra,* were decided without the convening of a specially constituted district court of three judges. In both cases jurisdiction was invoked under Title 28, United States Code, Section 2281 and injunctive relief was sought to enjoin the officials of Louisiana State University, respondents here, from refusing to admit Negroes to Louisiana State University.

Further, *Wichita Falls Junior College* v. *Battle,* 204 F. 2d 632 (pending here on petition for writ of certiorari), where the complaint sought injunctive relief against the refusal of the state officials to admit Negroes to the Wichita Falls Junior College, was held not to be a case requiring a hearing before a court of three judges. The Wichita Falls Junior College case cannot be put to one side on the theory that only local officers were involved. Segregation of the races in the educational institutions of Texas is a statewide policy, and it was this policy which was being enforced. As such, without regard to the geographical limitations set to their authority, the school officials were state officers within the meaning of Title 28, United States Code, Section 2281. *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Watch Tower Bible & Tract Society* v. *Bristol,*

24 F. Supp. 57 (Conn. 1938), aff'd 305 U. S. 572; *Cleveland* v. *United States,* 323 U. S. 329. Hence that decision as well as the aforementioned *Foister* and *Payne* decisions are inconsistent with the holding in this case.

Conclusion

WHEREFORE, for the reasons hereinabove stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

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